

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION.**

CRIMINAL APPEAL NO. 155 OF 2001

Devidas Dattatraya Deshmukh

..... Appellant.
(ori. accused no.1)

versus

The State of Maharashtra

..... Respondent.

.....

Mr. A.P.Mundargi with Ganesh Gole for
accused/appellant.

Mrs. P.H.Kanthria APP for State.

.....

**CORAM ; V.G.PALSHIKAR &
SMT. NISHITA MHATRE, JJ.**

DATED; 5TH APRIL, 2005.

ORAL JUDGMENT (Per Palshikar, J.);

1. Being aggrieved by the judgment dated 12-02-2001 passed by the 4th Additional Sessions Judge, Pune in Sessions Case No.503/99, the appellant has preferred this appeal on the ground mentioned in the memo of appeal as also canvassed before us.

2. With the assistance of the learned advocate appearing on behalf of the appellant and the learned APP, we have scrutinised the entire record, and re-appreciated the evidence both oral and documentary as is raised on the record before the Additional Sessions Judge.

3. The prosecution story as emerges from our re-appreciation of evidence stated briefly is as under:

4. Complainant Bajrang Alam is the real brother of deceased Ankush Alam and injured Pandurang Alam and are the residents of village Vadgaon, Maval, District Pune. Both accused including the appellant are the real brothers and are the sons of the maternal cousin uncle of the complainant and they reside in the said village i.e. Vadgaon, Maval, District Pune. It is alleged that the accused-appellant had suspicion that the complainant's brother Pandurang had illicit relations with the wife of accused no.2 and it is also alleged that there was enmity between accused persons and the complainant's family members. On 1-6-1999 at 12.30 a.m. when the complainant and his two brothers were at home with their maternal uncle, the appellant came to their house with accused no.2 and by knocking the door asked to open the door. The complainant and his brothers woke up and Ankush wrapped towel around his waist and switched on the lights and opened the door and thereby complainant, his brother Pandurang and maternal uncle Chaburao followed Ankush. It is alleged that the present appellant was holding knife, and as soon as Ankush came out of the house, accused no.2

started assaulting him with kicks and fist blows. It is alleged that the present appellant allegedly assaulted Ankush with knife. It is further alleged that when Pandurang tried to intervene he was also assaulted. After the assault, the accused persons fled away. When the complainant checked Ankush he was already dead. The complainant immediately rushed to the police station and lodged a complaint. The accused persons then came to be arrested after the investigation. The police after completion of investigation committed the case to the Court of Sessions for trial. The accused denied the charges and was exercising right of private defence.

5. The prosecution has examined 9 witnesses to prove its case. The learned trial Judge on appreciation of such evidence came to the conclusion of guilt, and convicted the accused no.1 to suffer imprisonment for life and it is this judgment and order of conviction which is impugned before us on the grounds mentioned in the memo of appeal as also canvassed before us.

6. The basic contention of Shri Mundargi the learned counsel appearing on behalf of the appellant was that the prosecution has not brought before the court the complete evidence and have not disclosed the facts

which factually did occur at the scene. Relying on the deposition of P.ws. 1, 2 and 3, two of whom are eye witnesses and one of whom is injured, pointed that admittedly there was scuffle between the parties. P.w.1 mentioned that there were 6 other persons present on the spot when the assault began and yet the prosecution has not examined any independent witness. Both P.ws. 2 and 3 are eye witnesses and are closely related to the victim and therefore the prosecution should have led adequate corroborative evidence to prove the case of the prosecution.

6. Countering this submission, the learned A.P.P. pointed out that though independent witnesses were available and have not been examined, the testimony of P.ws. 2 and 3 who were eye witnesses and were naturally present at the spot is adequate and proved beyond doubt the involvement of the accused in the assault. The contention of the Learned APP that looking to the fact that the deposition of P.w.4 proves homicidal death of the victim, there is no error in the order of conviction. We have to consider this rival submissions in the light of the reappraisal of the evidence that we have undertaken.

7. It is true that the prosecution has not examined

independent witnesses though they were available. A cohesive reading of the evidence of P.w.s 1, 2 and 3 clearly disclose that there was assault by the accused persons on the complainant party and that there was existing feud between the two groups. Infact p.w.3 who is injured in the assault and was an eye witness has himself deposed to the fact that one of the accused did receive simple injury while he was avoiding attack on his person.

8. P.w.5 Dr. Laxmikant who examined P.w.3 injured eye witness has also admitted in his cross examination that the injuries caused to P.w.3 can be caused as a result of scuffle between two quarrelling groups. P.w.8 Mahendra has duly proved the recovery of knife at the instance of the accused. It is corroborated by the statement of P.w.9 Sushil who was the A.P.I. and investigating officer. Taking over all view of the evidence and re-appreciation of evidence, it appears to us that the learned trial Judge has not committed any error in appreciating the evidence. The fact that there was assault is proved beyond doubt, the fact that there is enmity between the groups is proved beyond doubt and it is also obvious from the evidence on record that there was assault by the complainant also on the accused persons and some of whom have received

simple injuries. The possibility of the scuffle between the groups due to previous enmity cannot be overruled. In such circumstances it cannot be conclusively incurred in the absence of independent corroborative evidence that the assault committed by the accused persons was with an intention to commit murder only. The possibility of the accused persons have exceeded their right of self defence cannot be overruled, and it cannot therefore be found with certainty that the present case is not governed by one of the exception mentioned in section 300 of IPC. In such circumstances we find it unsafe to form conviction under section 302 IPC. In the result, therefore the appeal succeeds and is partly allowed. We therefore set aside the order of conviction under section 302 IPC instead, convict the accused no.1 i.e. the appellant, under section 304(ii) of IPC and sentence him to suffer R.I. for a period of six years. It is informed at the bar that the period of six years is over. If it is factually so over, the accused then be released forthwith if not otherwise required.

XXXX